SUPREME COURT, U. S.

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MICHAEL RODAK, JR.,

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-945

C. W. JONES and C. W. JONES and JONES INVESTMENT COMPANY, d/b/a SUMMIT HOMES, and JOMACO, INC.,
Petitioners,

vs.

C. ED GAINES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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In the Supreme Court of the United States

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C. W. JONES and C. W. JONES and JONES INVESTMENT COMPANY, d/b/a SUMMIT HOMES, and JOMACO, INC.,
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vs.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

To: The Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States

The petitioners C. W. Jones and C. W. Jones and Jones Investment Company, d/b/a Summit Homes, and Jomaco, Inc., pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit filed in these proceedings on October 18, 1973.

A timely filed petition for rehearing was overruled by the Court of Appeals.

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Missouri denying respondent recovery of liquidated damages under the terms of an employment contract with petitioners is unreported and appears in the Appendix to this petition as Appendix A.

The opinion of the United States Court of Appeals for the Eighth Circuit reversing the District Court and allowing respondent recovery of liquidated damages under the terms of the employment contract, appears in the Appendix to this petition as Appendix B and is as yet unreported.

The judgment of the United States Court of Appeals to be reviewed was entered on October 18, 1973 and appears in the Appendix to this petition as Appendix C.

The petition for rehearing was filed on November 1, 1973, and appears in the Appendix to this petition as Appendix D.

The Order of the Court of Appeals denying the petition for rehearing was filed on November 8, 1973 and appears in the Appendix to this petition as Appendix E.

A stay of mandate was issued by the Court of Appeals on November 23, 1973 and appears in the Appendix to this petition as Appendix F.

JURISDICTION

The opinion of the Eighth Circuit Court of Appeals was filed on October 18, 1973, reversing the judgment and opinion of the United States District Court for the Western District of Missouri and holding that the petitioners were

liable for payment of liquidated damages under the terms of the employment contract with respondent. Judgment was entered on that date. The petition for rehearing was filed November 1, 1973, and overruled November 8, 1973. The Court of Appeals issued a stay of mandate on November 23, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Should the Eighth Circuit Court of Appeals, in contravention of the rule set forth in *Saunders* v. *Shaw*, 244 U.S. 317, 61 L.Ed. 1163 (1916), be permitted to deprive petitioners of their day in Court, thereby depriving petitioners of due process of law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States, by refusing to order a new trial, thereby denying petitioners the right to controvert evidence of plaintiffs?

2. Should the Eighth Circuit Court of Appeals be permitted to contravene the Supreme Court's decision in *Priebe and Sons* v. *United States*, 332 U.S. 407, 92 L.Ed. 32 (1947) by holding that a liquidated damages clause is not a penalty and therefore is enforceable even though the agreed amount in the contract has no reasonable relationship to the amount of damage actually suffered, when this Court has held that the agreed amount in the contract must bear a reasonable relationship to the amount of damages actually suffered, thus permitting the Eighth Circuit Court of Appeals to decide a question in a way in conflict with an applicable decision of this Court?

3. Should the Eighth Circuit Court of Appeals in contravention of *Erie* v. *Tompkins*, 304 U.S. 64, 82 L.Ed. 1188 (1937) be permitted to hold that a liquidated damages

clause is not a penalty and therefore is enforceable even though the agreed amount in the contract has no reasonable relationship to the amount of damages actually suffered when the Courts of Missouri have specifically held that the agreed amount in the contract must bear a reasonable relationship to the amount of damages suffered?

4. Should the Eighth Circuit Court of Appeals be permitted to modify existing contracts by changing the substantive law of the State of Missouri in holding that the intention of the parties at the time an employment contract is executed is the determinative test of whether a liquidated damages clause of that contract is or is not a penalty, which is contrary to the prior holdings of the Courts of the State of Missouri which have specifically rejected that test, thereby modifying the state law of Missouri in violation of the doctrine of *Erie* v. *Tompkins*, supra?

CONSTITUTIONAL PROVISIONS INVOLVED

FIFTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State,

to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

STATEMENT OF THE CASE

Federal jurisdiction was based on diversity of citizenship, 28 U.S.C. 1332. Petitioners terminated respondent's employment while a two-year employment contract was in effect. Under certain provisions of that portion of the contract designated "Optional Discharge of Gaines", respondent was entitled to receive and petitioners were to pay the sum of Seventy-five Thousand Dollars ($75,000) if optional discharge occurred within a certain time period. The sum of Seventy-five Thousand Dollars ($75,000) was in lieu of any share of the profits from a partnership agreement among the parties which was executed at the same time that the employment contract was executed. The partnership never earned any profits. Optional discharge

did occur within the specified time period and upon refusal to pay by petitioners, respondent filed a suit claiming petitioners owed respondent Seventy-five Thousand Dollars ($75,000). Judgment was entered in the United States District Court for the Western District of Missouri for petitioners. The District Judge held that plaintiff was unable to perform the contract and had not performed the contract, and further that the Seventy-five Thousand Dollar ($75,000) provision in the employment contract was not reasonably related to any damage suffered by respondent so that said damage clause was a penalty and therefore unenforceable (Appendix A). The District Court further found that respondent suffered no actual damage (Appendix A).

The Eighth Circuit Court of Appeals filed its Opinion on October 18, 1973, reversing the District Court and holding the petitioner liable for the Seventy-five Thousand Dollars ($75,000) and interest, and in so doing recognized that it did not follow the applicable law of Missouri when it stated that the Court "is applying the test which it believes should be the controlling principle" (Appendix B).

Subsequent to the filing of the Opinion by the Eighth Circuit Court of Appeals, petitioner filed its petition for rehearing (Appendix D), which was denied November 8, 1973 (Appendix E). A stay of mandate was issued by the Court of Appeals on November 23, 1973 (Appendix F).

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The Eighth Circuit Court Of Appeals In Contravention Of The Rule Set Forth In Saunders v. Shaw, 244 U.S. 317, 61 L.Ed. 1163 (1916), Deprived Petitioners Of Their Day In Court, Thereby Depriving Petitioners Of Due Process Of Law In Violation Of The Fifth And Fourteenth Amendments To The Constitution Of The United States, By Refusing To Order A New Trial, Which Denied Petitioners The Right To Controvert Evidence Of Respondent.

During the trial in the District Court it was clear that under the applicable law respondent had failed to prove his case, in this Court-tried case. Therefore petitioners did not offer any evidence. The District Court agreed that respondent had failed to sustain his burden of proving a valid, enforceable contract; his capability of performing any contract; any damages suffered as a result of breach; and that the liquidated damage provision was reasonably related to any damages of respondent. For each of these separate reasons, the District Court entered judgment for petitioners. The Eighth Circuit reversed, and entered judgment for respondent. On Motion for Rehearing, petitioners sought a new trial to allow them to adduce evidence favorable to them, the need for which had not existed due to respondent's failure to sustain his burden of proof. The Motion for Rehearing was denied.

In *Saunders* v. *Shaw*, 244 U.S. 317, 61 L.Ed. 1163 (1916), this Court reversed a judgment entered by the Supreme Court of Louisiana, which, in turn, had reversed a lower court opinion. Defendant in the trial court had not offered evidence to rebut plaintiff's evidence, because the trial court had ruled plaintiff's evidence inadmissible.

The Supreme Court of the United States held, l.c. 244 U.S. 319,

> "He now brings this writ of error and says that he has been deprived of due process of law, contrary to the 14th Amendment, because the case has been decided against him without his ever having had the proper opportunity to present his evidence. Technically this is true, for when the trial court ruled that it was not open to the plaintiff to show that his land was not benefited, the defendant was not bound to go on and offer evidence that he contended was inadmissible, in order to rebut the testimony already ruled to be inadmissible in accordance with his view. The chief justice and Mr. Justice O'Niell were of opinion that the case should be remanded to the trial court, we presume upon the ground just stated. Probably the majority of the supreme court thought that it was so plain on the uncontroverted facts that the case was within the principle of the Myles Salt Co. Case that to remand it would be an empty form,—a mere concession to technicality. It may turn out so, but we do not see in the record an absolute warrant for the assumption, and therefore cannot be sure that the defendant's rights are protected without giving him a chance to put his evidence in."

The Eighth Circuit may have thought that to remand would be "an empty form—a mere concession to technicality." Petitioners sought to have the case remanded in order to allow them the opportunity to adduce evidence —which would have established that even under the improper view of the law adopted by the Eighth Circuit, respondent was not entitled to recover. The Motion for Rehearing was denied, however.

Nor does *Saunders*, supra, stand alone. In *Helis* v. *Ward*, 308 U.S. 365, 84 L.Ed. 327 (1939) the Supreme

Court declined to order a new trial in a situation quite similar to this one—but *only because* there the petitioner failed to seek a new trial in his Motion for Rehearing and in his Petition for Certiorari to the Supreme Court. There, the Circuit Court had interpreted the meaning of a contract in a different manner than had the District Court, and had reversed judgment against plaintiff, and entered a judgment for $100,000.00 against defendant. This Court, per Justice Douglas, clearly indicated that had petitioner preserved the point, a new trial would have been granted. Here, of course, as noted, it was not a matter of the Circuit Court interpretation of the contract, but a clear change (an incorrect one, too) of the existing law by the Eighth Circuit, which it has not the power to do. Nor could the petitioners have foreseen the dramatic change of the law by the Eighth Circuit, while at the trial level, and put in evidence to protect themselves. The petitioners, in the words of *Saunders,* supra, should not have "been bound to go on and offer evidence" not needed nor relevant at the time. Clearly, a new trial should be ordered.

2. The Eighth Circuit Court Of Appeals In Contravention Of The Holding In Priebe And Sons v. United States, 332 U.S. 407, 92 L.Ed. 32 (1947), Has Ruled That A Liquidated Damages Clause Is Not A Penalty And Therefore Is Enforceable Even Though The Agreed Amount In The Contract Has No Reasonable Relationship To The Amount Of Damages Actually Suffered, When This Court In Priebe Held That The Agreed Amount In The Contract Must Bear A Reasonable Relationship To The Amount Of Damages Suffered.

The Eighth Circuit's opinion is directly contrary to the holding of the United States Supreme Court in *Priebe and Sons,* supra, thus deciding a question in a way in conflict with an applicable decision of this Court.

This Court held in *Priebe* that a liquidated damages clause must be reasonably related to the actual damages suffered in order to be enforceable.

That case involved delivery of certified, inspected dried eggs under the terms of a government contract by a certain date. The eggs were delivered within the time requirements of the contract, but the certificates of inspection were not completed by the date that they were to be ready. The purchaser (the United States) withheld the liquidated sum and *Priebe* instituted an action in the Court of Claims to recover, claiming that the United States was not actually damaged. This Court held, l.c. 39,

> "Under these circumstances, this provision for 'liquidated damages' could not possibly be a reasonable forecast of just compensation of the damage caused by breach of contract. It might, as the respondent suggests, have an in terrorem effect of encouraging prompt preparation for delivery. But the argument is a tacit admission that the provision was included not to make a fair estimate of damages to be suffered but to serve only as an added spur to performance. It is a well settled contract law that courts do not give their imprimatur to such arrangements. See *Kothe* v. *R.C. Taylor Trusts*, 280 U.S. 224, 74 L.Ed. 382, 50 S. Ct. 142. All provisions for damages are, of course, deterrents of default. But an exaction of punishment for breach which could produce no possible damage has long been deemed oppressive and unjust. See Salmond and Williams, Contracts, 2 ed. 1945, 202."

Priebe had substantially complied or completed his part of the contract by delivering the certified dried eggs within the time requested by the government. The Court held that to assess liquidated damages would be to exact a penalty. It should be noted that in the *Priebe* case, the

Court, in effect, used as evidence the fact that actual loss did not occur to decide that the provision was a penalty and would not be enforced. If the Eighth Circuit had followed *Priebe* the agreed amount in the contract would have been required to have a reasonable relationship to the amount of damage actually suffered by respondent. The evidence is uncontroverted that no actual damages were incurred by respondent. Because no actual damages were incurred the Eighth Circuit's opinion obviously fails to follow the Supreme Court's holding in *Priebe* v. *U. S.*, supra. To exact liquidated damages when respondent had no actual damages is unjust and oppressive and an "exaction of punishment for breach". This Court should not give its imprimatur to enforce such a harsh result.

3. The Eighth Circuit Court Of Appeals In Contravention Of Erie v. Tompkins, 304 U.S. 64, 82 L.Ed. 1188 (1937), Has Ruled That A Liquidated Damages Clause Is Not A Penalty And Therefore Is Enforceable Even Though The Agreed Amount In The Contract Has No Reasonable Relationship To The Amount of Damages Actually Suffered, When The Courts Of Missouri Have Held That The Agreed Amount In The Contract Must Bear A Reasonable Relationship To The Amount Of Damages Suffered.

Missouri law is crystal clear that an amount that bears no relationship to the amount of actual damages suffered is a penalty and not enforceable in a Missouri Court, and that the parties seeking recovery must prove that they actually suffered damage as a result of the breach, *Franken* v. *Carpenter*, 374 S.W. 2d 15, 19 (St.L. C.A., 1963), *Corrigan* v. *Fleischer*, 423 S.W. 2d 209, 214 (St.L. C.A., 1967), *Berger* v. *McBride & Son Builders, Inc.*, 447 S.W. 2d 18 (St.L. C.A., 1969), *Stein* v. *Bruce*, 366 S.W. 2d 732 (Mo. App., 1963) and *Manufacturers Casualty Insurance Com-*

pany v. *Sho-Me Power Corporation*, 157 F. Supp. 681 (W.D. Mo., 1947). All of these cases held that it is incumbent upon the party seeking recovery to prove that damages have, *in fact, occurred* and that the stipulated amount is not out of proportion to the damages *actually* suffered. Missouri cases have been in complete agreement with this proposition for over 70 years.

Yet the Eighth Circuit did not follow the applicable law of Missouri and so admitted at page 14 of the slip opinion when it stated that the Court was applying the test which it believed "should be the controlling principle". The cases cited by the Eighth Circuit do not represent the holding of the Missouri Courts. The cases of *Southwest Engineering Company* v. *U. S.*, 341 F. 2d 998 (8th Cir.), cert. denied, 382 U.S. 819 (1965) and *U. S.* v. *J. D. Streett & Company*, 151 F. Supp. 469 (E.D., Mo., 1957) are clearly inapplicable. They do not represent the law of Missouri. The opinion of the Eighth Circuit clearly applied what it ". . . feel(s) . . . should be the controlling principle" (page 14 slip opinion) and ignores the District Court's interpretation of state law.

The effect of the Eighth Circuit Court of Appeals decision is to negate the holdings of *Franken*, supra, *Corrigan*, supra, *Stein*, supra, *Berger*, supra, and *Manufacturers Casualty Insurance*, supra. It is the law of Missouri that if no actual damages are suffered then the liquidated damages clause is a penalty and therefore is unenforceable. Missouri law must be followed by the Eighth Circuit under the doctrine of *Erie Railroad* v. *Tompkins*, 304 U.S. 64, 82 L.Ed. 1188 (1937). The opinion wholly and totally failed to follow Missouri law in contravention of the requirement of *Erie*. The opinion of the Eighth Circuit should be vacated, and the learned Trial Court's judgment reinstated, as it correctly applied Missouri law.

4. The Eighth Circuit Court Of Appeals In Contravention Of The Doctrine Of Erie v. Tompkins, Supra, Changed Private Employment Contracts So As To Affect The Employer-Employee Relationship Of Citizens Of The State Of Missouri By Adopting The Foresight Test Of Whether A Liquidated Damages Clause Is Or Is Not A Penalty, After The Courts Of The State Of Missouri Have Specifically Rejected That Test. In Adopting Such Test The Eighth Circuit Modified The State Law So As To Contravene The Doctrine Of Erie v. Tompkins, Supra.

The test under Missouri law as to whether a liquidated damages clause is enforceable is whether the amount agreed upon in the contract is out of proportion to the damage actually suffered, and actual damage must be suffered and proved. *Franken* v. *Carpenter,* supra, and *Corrigan* v. *Fleischer,* supra. If damages are not reasonably related to the liquidated provision the amount is a penalty, and the contract is unenforceable, *Franken,* supra, *Corrigan,* supra.

Missouri Courts in requiring a showing of actual damage have clearly adopted a "hindsight result" test to measure reasonableness of a liquidated damage provision, for the obvious reason that a *sine qua non* is actual damage. Absent a determination that actual damages have occurred, there cannot possibly be a determination as to whether a liquidated damages clause is or is not out of proportion to damage "actually suffered".

The test imposed by the Missouri Courts is the only fair test for both parties to a contract. At the time a contract is executed, neither party to the contract has knowledge as to what if any actual damages will be suffered in the future and the liquidated damages can be only their best guess. Thus, if no actual damages are suffered at

the time of one party's breach, and the liquidated damages clause is enforced against him, it becomes an obvious penalty. If, however, actual damages are suffered to such a degree that they are reasonably related to the liquidated damages provision in the contract, then the agreed amount is reasonable, no penalty is being enforced, and the courts will order the contract enforced.

However, to apply a "foresight result" test may lead to the unjust enrichment of one party to the contract and to the courts enforcing private penal provisions in violation of public policy.

CONCLUSION

For the reasons stated above a Writ of Certiorari should issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on October 18, 1973.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 18922-1

C. ED GAINES,
Plaintiff,

vs.

C. W. JONES, and C. W. JONES, as individual, and JONES INVESTMENT CORPORATION, d/b/a Summit Homes, and JOMACO, INC.,
Defendants.

MEMORANDUM OPINION AND ORDER

(Filed January 5, 1973)

I.

This is a jury-waived case. The parties' suggested findings of fact and suggested conclusions of law have been carefully prepared with appropriate references to the record. Those suggested findings show that while there are substantial areas of factual agreement, the parties disagree radically in regard to particular areas of the factual circumstances presented.

The case is complicated by the fact that the lawyers who drafted the various complicated legal documents which established the formal legal relationships between the parties were apparently dominated by their consideration of the tax consequences of the real estate development involved. In addition, one of the lawyers in the tax firm which had long represented the defendants injected him-

self into the business aspect of the real estate development to the extent that he suggested plaintiff's name to the defendants and made material representations in regard to the qualifications, experience, and abilities of the plaintiff which we must find to be false. Plantiff, under the circumstances, did not feel any need to be, and was not, represented by independent counsel during the negotiations. Plaintiff was content to acquiesce in the representations made on his behalf by defendants' lawyer and to knowingly accept the benefits of those representations which he knew to be false.

The case has also been complicated by plaintiff's continued assertion of alternative legal theories in the various Counts of the four-count complaint until the actual trial of the case. That problem was finally placed in focus by plaintiff's application pursuant to Rule 41 of the Federal Rules of Civil Procedure to dismiss Count III and Count IV of his complaint without prejudice.

That application was made contemporaneously with the filing of plaintiff's suggested findings of fact and suggested conclusions of law. The suggestions in support of plaintiff's application simply quoted the provisions of Rule 41(a)(2) and did not set forth any factual basis upon which the Court could base an appropriate exercise of the discretion vested by that Rule.

Defendants vigorously resist the dismissal of Count III and Count IV without prejudice, directing attention to such cases as *International Shoe Co.* v. *Cool,* (8th Cir., 1946) 154 F. 2d 778; *Elder* v. *Dixie Greyhound Lines,* (8th Cir., 1946) 158 F. 2d 200; and *Pace* v. *Southern Express Co.,* (7th Cir., 1969) 409 F. 2d 331.

We believe that the principles stated in those cases establish that plaintiff is not automatically entitled at this late date to dismiss Count III and Count IV of the com-

. . . plaint without prejudice. Plaintiff's failure to suggest any findings of fact or conclusions of law in connection with those two counts implicitly concedes that plaintiff failed to establish even a prima facie case in regard thereto.

Under the circumstances, we make the findings of fact and conclusions of law suggested by the defendants in connection with Count III and Count IV (which we incorporate in this Memorandum Opinion by this reference) and conclude that plaintiff's application to dismiss without prejudice should be denied. We also find and conclude that defendants are entitled to judgment on the merits in regard to both Count III and Count IV.

Defendants, at the time they filed their suggested findings of fact and suggested conclusions of law, also filed a motion for leave to amend their first amended answer to conform to the evidence. That amendment seeks to add a fifth defense to Count I and Count II. The new defense is more or less alternative in nature, and pleads that the contractual relationship between the parties is void and unenforceable due to mutual mistake of fact in regard to the nature of the duties plaintiff was to perform thereunder, as demonstrated by his trial testimony. In light of the evidence adduced at trial defendants' motion should be granted and the Court will make specific findings in regard thereto.

In the next part of this Memorandum Opinion we will make additional findings of fact in regard to Count I and Count II and the defenses pleaded thereto. As will be apparent from the files and records we have generally followed the pattern of the findings and conclusions suggested by the defendants with what we deem appropriate modifications, additions, and omissions. We think the case will be in better posture for possible appeal if we also indicate that in addition to the findings made in Part

II, we also make all findings suggested by the plaintiff which the defendants expressly and without qualification admitted in full. Those findings are incorporated in this Memorandum Opinion by this reference.

II.

ADDITIONAL FINDINGS OF FACT

1. The events leading up to the lawsuit commenced on September 6 or 7, 1969, when one of the defendants, C. W. Jones, made a telephone call to his tax attorney, Sylvanus G. Felix, in Oklahoma City, Oklahoma, to discuss building apartments on a tract of land of approximately 100 acres in Independence, Missouri, owned by Jones and Summit Homes.

2. During a conference in Oklahoma City on September 8, 1969 between the defendant Jones and Felix, defendant indicated to Felix that he needed someone who could take over and handle the whole apartment complex so that defendant (Jones) would not be required to give his detailed personal attention to the project.

3. Felix advised defendant that he knew just the man who could handle the project and mentioned plaintiff, C. Ed Gaines, informing defendant that plaintiff had been a close personal friend of his for years.

4. Felix advised defendant that plaintiff had been in the real estate business for 8 or 9 years, had considerable experience in all phases of real estate activity including subdividing, selling land, building houses, and had assisted and worked on conventional financing for apartment houses.

5. Felix was actively recommending plaintiff when the representations about Gaines' qualifications, experience and expertise were made on September 9, 1969.

6. Felix contacted plaintiff on September 9, 1969 and informed him that defendant Jones wanted a General Manager to administer the development of the real estate owned by the defendant.

7. Plaintiff was informed on September 9, 1969 of Felix's discussions with defendant, the representations which Felix had made to defendant and what would be expected of plaintiff.

8. Plaintiff and defendant met in Independence, Missouri, on September 12, 1969.

9. Plaintiff and defendant thereafter met in Oklahoma City on September 18, 1969 with Felix and Bowman to discuss the terms of the agreement between plaintiff and defendant.

10. Felix was employed by defendant. Plaintiff was not represented by employed counsel. In spite of the obvious potential conflict, Felix did not insist that plaintiff retain separate counsel. Indeed, Felix continued to recommend and to represent to defendant throughout the negotiations that plaintiff was a person competent to fill defendant's needs.

11. As a result of the meeting of September 18, 1969, plaintiff and defendants eventually executed various documents described as a base contract, a partnership agreement, and employment contract.

12. Plaintiff understood at the time he entered the agreements that defendants were hiring him because of the special and established executive ability which plaintiff claimed to have in obtaining a John Hancock loan and because of the prior experience and association with Glen Justice Mortgage Company which plaintiff professed to have. Plaintiff was fully advised of the representations

made on his behalf by Felix and knowingly permitted Felix to make those representations to defendant.

13. Plaintiff knew that defendant Jones was relying upon the representations of plaintiff's qualifications and experience which Felix had made to Jones.

14. Plaintiff accepted the benefits of the contract which was entered as a result of the representations made by Felix.

15. Although it is apparent that the tax consequences of the formal legal relationships between the parties dominated the form of complicated contracts executed by the parties, we find from the instruments themselves and other circumstances in the case that defendants hired plaintiff to be a general manager and to completely take over the detailed development of the Glendale Gardens apartment project, a multi-million dollar multi-family apartment project.

16. Plaintiff's duties were to include arranging for a multi-million dollar loan through conventional or FHA sources and all work associated with obtaining financing. Plaintiff's notion that "plaintiff's duties were to perform such duties as assigned by Jones" (p. 14 of plaintiff's response filed April 27, 1972) is inconsistent with all the facts and circumstances of this case. Defendant would not have had to go to Oklahoma City to locate such a person or to pay such a person $3,000 per month plus a substantial share of the hoped for profits.

17. Plaintiff made little or no contribution in the development of the Glendale Gardens Apartment project. His contribution was consistent with his untenable trial position that he was only supposed to do what defendant told him to do.

18. Plaintiff only contacted two financial representatives, Glen Justice Mortgage Company and Charles Curry Company in attempting to arrange financing.

19. Plaintiff never attempted to secure FHA financing.

20. Plaintiff never had any substantial written correspondence or application for any loan to any financial institution. Nor did he ever deal directly with any financial institution.

21. Plaintiff only made phone calls to financial representatives in attempting to get a loan and was no closer to obtaining a loan commitment when he left Kansas City on May 15, 1970 than when he arrived on October 1, 1969.

22. Plaintiff never made an accurate estimate of the total costs of the project to be submitted to a lender.

23. Gaines never projected cost estimates from preliminary plans other than on an estimated cost per square foot basis. Such a projection was obviously useless in any effort to obtain adequate financing for the project.

24. The only partial building cost figures ever used in applying for a loan were based on a cost per square foot basis.

25. Defendant Jones did not interfere with plaintiff in his work of trying to get a commitment.

26. Plaintiff's only contribution to the development of the project, as established by his own evidence, was obtaining a list of bidders, gathering the minimum property specifications for the project and figuring monthly and yearly income based upon a rental income figure of 19¢ per square foot.

27. Estimates of building costs made by plaintiff and Taylor based upon a square foot cost on April 7, 1970

were $300,000 lower than that submitted with the application for loan to FHA on April 13, 1970.

28. Plaintiff had in fact no prior executive experience with the development of large apartment complexes.

29. Plaintiff had never negotiated prior to October 1, 1969 for a loan commitment exceeding one million dollars.

30. When plaintiff took the job with defendants, plaintiff was expecting defendant Jones' assistance in negotiating for the loan even though plaintiff knew he was to be General Manager.

31. Plaintiff has failed to prove by a preponderance of the evidence that he fully or even partially performed or was able to perform his obligations under the contract.

32. Defendants were induced to enter the contracts based upon the representations made by Felix in regard to plaintiff's qualifications and experience, which plaintiff knowingly knew were being made on his behalf by Felix and which plaintiff implicitly authorized Felix to make with full knowledge that defendants would, under the circumstances, rely upon.

33. Plaintiff did not in fact possess the experience or qualifications which plaintiff and Felix led the defendant Jones to believe that plaintiff had.

34. The representations made to the defendants in regard to plaintiff's qualifications and experience were false.

35. Defendants rescinded all contractual relationships with the plaintiff on May 15, 1970 for plaintiff's inability to perform his duties.

36. Plaintiff was restored to his former position and made whole when that contractual relationship was rescinded.

37. Plaintiff did not suffer any loss or expense, monetary or otherwise, by moving from Oklahoma City, Oklahoma to Independence, Missouri.

38. The Glendale Development Company has not made a profit as of the date of trial.

39. Any profit participation to which plaintiff would have been entitled would have been reduced by his accumulated salary of $21,000 since beginning with defendant on October 1, 1969.

40. The amount of profits to which plaintiff would have been entitled to date and the amount of loss plaintiff has suffered by moving from Oklahoma City to Kansas City is zero.

41. The plaintiff returned to Oklahoma City in May, 1970 and resumed the same occupation he had been involved in before October, 1969.

III.

ADDITIONAL CONCLUSIONS OF LAW

1. Plaintiff's failure and inability to perform under the contract bars him from recovering under the contract for defendants' alleged breaches. One suing on a contract must allege and prove his own performance and ability to perform. The evidence establishes that plaintiff did not and was not able to perform. Plaintiff may not recover under either Count I or Count II because of his failure to prove by a preponderance of the credible evidence that he did in fact perform and that he was able in fact to perform the duties contemplated by the parties.

2. The plaintiff by implication ratified the representations made on his behalf by Felix, with knowledge that the defendants would rely upon those representations. The

evidence establishes that Felix made false representations to defendant Jones as to plaintiff's qualifications and experience. Plaintiff realized that under the circumstances the representations were made that Jones would rely upon them. Plaintiff said nothing and proceeded to accept the benefit of the contract induced by the representations. Under the circumstances, plaintiff must be held to have ratified the representations made by Felix to the same extent as though he were the direct actor in regard to the representations.

3. The contracts entered into between the plaintiff and the defendants were voidable at the election of the defendants because C. W. Jones was induced into entering those contracts based upon the fraudulent and false representations made by the plaintiff and Sylvanus Felix as to plaintiff's qualifications, experience and ability to completely handle an apartment complex development.

4. The defendants were entitled to rescind the contracts unilaterally because of the false and fraudulent representations made by the plaintiff and did so by the letter of May 15, 1970, written by Jones to Gaines. A false representation of a material fact is grounds for rescission even though innocently and honestly made.

5. The defendants were entitled to and did rescind the contracts because of plaintiff's breach of the contracts. Plaintiff's inability and failure to perform the executive duties contemplated by the contracts was a breach of vital provisions which went to the essence of all three agreements. Defendants were therefore entitled to rescind and plaintiff was entitled to be returned to his status quo. This was done and more since plaintiff made more money during his period of employment with defendants than he had ever made in his life.

6. Plaintiff's failure to adduce sufficient evidence in regard to his ability to perform and in regard to his performance under the contract bars him from recovering for any of the alleged breaches of contract by defendants.

7. Assuming for the sake of argument only, that the contracts were not voidable, we conclude that paragraph 6.5 of the preorganization and profit participation contract calls for damages grossly in excess of those actually sufferable by the plaintiff and therefore said clause must be considered as a penalty and therefore unenforceable.

8. Under the circumstances as they were developed by plaintiff's trial testimony, it is appropriate that we state the alternative conclusion that the contract could be said to be void because of the mutual mistake of fact as to what duties the parties contemplated would be performed by plaintiff as General Manager under the contracts. The documentary evidence is replete with references to the plaintiff's capacity as General Manager. See P. Exhs. Nos. 4, 5, 11, 12, and 13, for examples.

If plaintiff's testimony that he was merely to do what Jones instructed him to do is to be given credit, it is clear that plaintiff's understanding of what his duties and responsibilities were to be were clearly at variance with the concept of a General Manager who would be capable of relieving defendant Jones from all except the highest of executive decisions. If this portion of plaintiff's testimony is given credit, it follows that the parties did not have a meeting of the minds, but rather a mutual mistake of fact and want of assent in fact existed so as to render their entire contractual relationship void from the outset.

Plaintiff, in order to present a factual theory upon which to base an alleged right of recovery emphasized that he was only to do what Jones told him to do. While

we do not believe this testimony to be consistent with what the parties contemplated, nevertheless, the maintenance of that position forces the Court to find for the defendants under the alternative conclusion stated.

IV.

For the reasons stated, it is

ORDERED that plaintiff's application for dismissal of Count III and Count IV of plaintiff's complaint without prejudice should be and the same is hereby denied. It is further

ORDERED that defendants' motion for leave to amend their first amended answer so as to conform to the evidence should be and the same is hereby granted. It is further

ORDERED that judgment be entered for the defendants in connection with all four counts of plaintiff's complaint, together with their costs.

/s/ John W. Oliver
District Judge

Kansas City, Missouri
January 5, 1973

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 73-1090

C. Ed Gaines,
Appellant,

v.

C. W. Jones, and C. W. Jones and Jones Investment Company, d/b/a Summit Homes, and Jomaco, Inc.,
Appellees.

Appeal from the United States District Court for the Western District of Missouri.

Submitted: September 11, 1973.
Filed: October 18, 1973.

Before VAN OOSTERHOUT, Senior Circuit Judge, LAY and ROSS, Circuit Judges.

LAY, Circuit Judge.

Under the terms of a written contract the plaintiff, C. Ed Gaines, was employed from October 1, 1969, to December 31, 1971, by the defendants C. W. Jones and C. W. Jones and Jones Investment Company d/b/a Summit Homes and Jomaco, Inc. Gaines' services were terminated on May 15, 1970, and he subsequently sought damages for the alleged breach of contract by the defendants. The contract contained a liquidated damages clause that re-

quired the defendants to pay plaintiff $75,000 in the event Gaines was discharged within the first year.

The trial was held, with jury waived, before the district court, the Honorable John W. Oliver presiding. The court held in favor of the defendants on alternative grounds. The district court found that plaintiff had failed to prove performance, that defendants had been induced to sign the contract through fraudulent misrepresentations, and that the liquidated damages clause of the contract was unenforceable as a penalty clause. Alternatively, the trial court found that the contract was void because of a mutual mistake of fact as to what duties plaintiff was to perform under the contract. We find that the district court ruling was clearly erroneous.

Defendants owned approximately 100 acres of land in Independence, Missouri, which they wished to develop. Defendant Jones contacted his tax attorney, Sylvanus Felix, to discuss an apartment project for the land. Among other things, Felix recommended to Jones that he consider conventional rather than FHA financing because conventional financing would provide a higher per acre value for the land. In response to Jones' request, Felix also recommended Gaines as a suitable person to manage the real estate operation so that Jones would be free to pursue more leisure activities. Felix had the following to say of plaintiff:

> "Well, there [is] only one person that I [know] that could possibly fit into your category. I don't know *whether he is what you would want or not* and this one person is a very close friend of mine. I've known him for many years and he's *only been in the real estate business possibly eight or nine years.* He was head of his own big printing company, up until 1960 when he got into financial difficulties and had to give

up his company and lose it. and sometime after that, why, he went into the—went into the real estate business.

"He has considerable experience in all phases of real estate activities, including sub-dividing and selling land, building houses and has assisted and worked on apartment houses and these John Hancock loans.

"*But there are a lot of things that he would have to have guidance in,* but if you want a man that you can take, he might be interested in coming with you. It would have to be some sort of an incentive arrangement." (Our emphasis).

Subsequently, the parties met to work out the terms of the contract. Plaintiff commenced working for defendants on October 1, 1969, although the contract was not actually signed until December 7, 1969.

Plaintiff's duties under the contract drawn by Jones and his attorney were specifically written out as follows:

"GAINES shall render the following services to JONES, SUMMIT, JOMACO, and GLENDALE DEVELOPMENT CO.:

(1) Assist in evaluating and negotiating purchase of income and/or non-income improved and/or unimproved real properties.

(2) Negotiate and handle sales of properties presently owned, or hereafter acquired by any of them, subject only to advance approval of the price, terms and conditions of sale.

(3) As directed, handle and supervise subdivision development of presently owned unimproved real properties and those acquired in the future.

(4) Generally oversee all construction.

(5) Generally supervise the renting of all apartments constructed by Glendale Development Co.

(6) Do all other things directed by them relating to the duties set forth above."

It is undisputed that plaintiff's duties included the handling of financing for the apartment project. However, the rub came when Gaines was not successful in his attempts to secure financing. Defendants assert that it became evident that Gaines was not competent to handle loan negotiations for a multi-million dollar project and generally failed in his performance. Gaines, however, contends he did everything that was ever requested of him and that he performed under the contract as written.

Defendants did not offer any evidence. They insist that plaintiff simply failed to make out a prima facie case. We must disagree. Under Missouri law plaintiff must prove only that he substantially performed his part of the contract up to the time he was prevented from doing so by defendants. At this point the burden shifts to the employer to show that the discharge was for good cause. *Meyer* v. *Weber*, 109 S.W.2d 702, 706-707 (Mo.App. 1937).[1]

The trial judge made findings of fact and on this basis determined that plaintiff did not in fact perform his contract and that he was unable to perform the duties con-

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1. The Missouri courts have drawn a distinction between cases involving an employment contract for a definite term and those having no definite term. Only in the former is the burden of proving justification on the employer. See, e.g., *Tolliver* v. *Standard Oil Co.*, 431 S.W.2d 159 (Mo. 1968); *Maddock* v. *Lewis*, 386 S.W.2d 406 (Mo.), *cert. denied*, 381 U.S. 929 (1965); *Johnson* v. *Thompson*, 251 S.W.2d 645, 649 (Mo. 1952); *Craig* v. *Thompson*, 244 S.W.2d 37, 42 (Mo. 1951). The present case involves a contract for a definite term, so that defendant bears the burden of establishing justification.

templated by the parties. We are thus dealing with the question of whether the trial judge's findings are clearly erroneous. See *United States* v. *United States Gypsum Co.*, 333 U.S. 364 (1948).

Upon review of the record we conclude that the evidence does not support the trial judge's conclusion that plaintiff failed to perform under the terms of the contract. On the contrary, the evidence demonstrates substantial performance and that the defendants have failed to come forward with any evidence of justification for discharge.

We think it well settled law that performance under a personal service contract requires only that a party perform in a good and workmanlike manner, and unless an employee has expressly agreed to secure particular results, the results of his performance are not material. This was the early announced doctrine in Missouri and has generally been followed elsewhere. See, e.g., *Middendorf* v. *Schreiber*, 131 S.W. 122, 123 (Mo. App. 1910); *Dallas Hotel Co.* v. *Lackey*, 203 S.W.2d 557, 562 (Tex. App. 1947); *Morris* v. *Mueller*, 172 A. 63, 64-65 (N.J. Ct. App. 1934); 56 C.J.S. *Master & Servant* § 69 (1948). In *Middendorf* v. *Schreiber*, supra, plaintiff was hired by defendant to serve as a jockey for a term of three years. Early in the second year, plaintiff was fired. The defendant attempted to justify the discharge on the basis that plaintiff had turned out to be an incompetent jockey, primarily because he did not win any races. The court held for plaintiff, reasoning that although plaintiff had contracted to perform in a good and workmanlike manner, he did not necessarily warrant that he would win or that he possessed extraordinary skill. It was sufficient that he "possessed and exercised that degree of skill, knowledge, and ability as a jockey which is usually attained and employed by other jockeys." *Id.* at 123. His obligation, unless the contract had expressly required

more, was "to be determined by reference to the manner in which other ordinarily skillful jockeys performed the same service." *Id.*

In concluding that Gaines failed to perform, the district court found, *inter alia*, that plaintiff's duties under the contract included arranging for a multi-million dollar loan for the apartment project; that plaintiff only contacted two financial institutions in his attempts to secure financing; that plaintiff never attempted to secure FHA financing; that plaintiff had no *written* communications with any financial institutions; that plaintiff never made an accurate cost estimate of the project to be submitted to potential lenders; that plaintiff had no prior experience with large apartment developments; and that plaintiff had never before negotiated multi-million dollar loans.

As we view the entire record, we cannot agree that these findings established plaintiff's failure and inability to perform. First, the written contract spells out the obligations of the parties, and although plaintiff orally understood he would work on the financing arrangements for the apartment project, the contract itself is silent as to this being a specific duty. More important, the contract clearly does not require success in obtaining such financing.

Second, there is no evidence that Jones expected plaintiff to exhaust all possible sources in his attempts to secure financing. Plaintiff contacted two companies and felt it was against defendants' interest to engage in further "loan shopping."

Third, the undisputed evidence is that plaintiff did not seek FHA financing because defendant directed him not to do so.[2]

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2. Jones ultimately obtained an FHA loan. Jones had earlier told Gaines that he hoped to get $30,000 to $40,000 an acre for his land, which was not possible under an FHA loan.

The evidence shows that defendants were interested only in a "John Hancock" loan wherein a sale and lease-back arrangement was involved.

Fourth, Jones himself admitted that it was not his custom to make formal written applications for loans. He would "go down and talk to them." This plaintiff did with two financial institutions. In addition, the evidence is that plaintiff mailed plans to the Glen Justice Mortgage Company and met with representatives of the Charles Curry Company on several occasions. Plaintiff obtained bids from subcontractors and attempted cost estimates by getting a cost per square foot estimate. There is no testimony which demonstrates this was improper performance.

Fifth, plaintiff's past job experience was accurately represented. He never represented that he had previously negotiated multi-million dollar loans or that he had experience with large apartment complexes. On the other hand, there was evidence that his experience included the development of Southern Oaks, a 300 home-site project in Oklahoma City and Oak Cliff, a housing project of approximately 200 lots. Plaintiff had also previously operated a house building company and a real estate sales company. Plaintiff had prior experience with FHA and John Hancock loans.

Finally, we note that although plaintiff began working for defendants on October 1, 1969, the contract was not signed until December 7, 1969. Defendants thus had ample opportunity to observe plaintiff's performance before entering into the contract. At no time is specific complaint made or evidence adduced as to plaintiff not performing as required; in fact the only evidence along this line is that plaintiff was unable to successfully secure conventional financing for the apartment project. His failure to obtain a loan commitment was not shown to be from

lack of diligence or effort. He explained that the mortgage market was "drying up" and had "gone completely down." According to plaintiff, Jones at one point told him: "Don't worry about it. If we don't do it this six months we will do it next year. There is no problem."

In sum, the record clearly establishes the terms of the contract and plaintiff's performance under it. Under these circumstances, we hold the trial court's findings to be clearly erroneous.

Fraudulent Inducement

It is undisputed that Gaines was not present at the time Felix, Jones' attorney, first told Jones about plaintiff. Nor is there any evidence that Gaines ever learned what Felix said to Jones. It is difficult to understand how Gaines can be held responsible for Felix's alleged misrepresentations when there is no evidence that Gaines knew what was said or in anyway ratified Felix's statements. Moreover, we find that Felix's statements to Jones were not false. Furthermore, the record adequately demonstrates that Jones was sufficiently alerted when Felix added:

> "*But there are a lot of things that he would have to have guidance in,* but if you want a man that you can take, he might be interested in coming with you." (Our emphasis).

The finding of fraudulent inducement is simply not supported by the record.

Mutual Mistake of Fact

The trial court alternatively held the contract void because of a mutual mistake of fact as to the duties the parties contemplated would be performed by Gaines, as

General Manager, under the contract. The trial court concluded that Jones expected Gaines to carry out all but the highest executive responsibilities whereas it assessed Gaines' testimony as meaning that Gaines thought he was to perform only those duties Jones assigned to him. There is no evidence to support this finding. Plaintiff testified that he understood Jones "wanted a general manager, somebody to run his full real estate operation in the sales and the development of this balance of land that he had." If Jones contemplated that Gaines' obligation was to be successful in obtaining a conventional loan for the project, this must be viewed as a unilateral mistake by Jones, not in any manner induced by Gaines. Absent exceptional circumstances, a unilateral misunderstanding, not induced by a party to the contract, will not afford relief for rescission. See, e.g. *Saline County* v. *Thorp*, 88 S.W.2d 183, 185 (Mo. 1935); *Frederich* v. *Union Electric Light & Power Co.*, 82 S.W.2d 79, 86 (Mo. 1935); *Law Reporting Co.* v. *Whitaker*, 254 S.W. 715, 716 (Mo.App. 1923).

Liquidated Damages

The contract provided that in the event Gaines was discharged prior to December 1, 1970, he was to receive $75,000. The trial court found that this clause called for "damages grossly in excess of those actually suffered by the plaintiff and therefore said clause must be considered as a penalty and therefore unenforceable."

We find this analysis reflects an erroneous application of the law governing liquidated damages. The intention of the parties *at the time the contract is executed* is determinative of whether a cause is or is not a penalty. In *Southwest Engineering Co.* v. *United States*, 341 F.2d 998 (8th Cir.), *cert. denied*, 382 U.S. 819 (1965), this court

made the following observation on liquidated damages clauses:

> "Two requirements must be considered to determine whether the provision included in the contract fixing the amount of damages payable on breach will be interpreted as an enforceable liquidated damage clause rather than an unenforceable penalty clause: *First, the amount so fixed must be a reasonable forecast of just compensation for the harm that is caused by the breach, and second, the harm that is caused by the breach must be one that is incapable or very difficult of accurate estimation....*
>
> *"Whether these requirements have been complied with must be viewed as of the time the contract was executed rather than when the contract was breached or at some other subsequent time.* Courts presently look with candor upon provisions that are deliberately entered into between parties and therefore do not look with disfavor upon liquidated damage stipulations." *Id.* at 1001. (Our emphasis).

At the time the present contract was executed, it clearly met the two requirements noted above. Had plaintiff continued to work for defendant, he could reasonably have expected to earn substantial sums under the provision of the contract which provided for plaintiff to receive ten per cent of any profits derived from land sales. Defendant told plaintiff that he could expect at least $50,000 to $60,000 in the first year, provided a John Hancock loan was obtained. Thus, the liquidated damages clause seems to have been a reasonable forecast of the harm plaintiff could expect if he was discharged prior to sharing in the profits.

Plaintiff's situation also meets the second requirement in that before any profits were realized, no more than a rough estimate of plaintiff's loss could be made.

Defendant urges that the test under Missouri law is that the amount agreed upon must not be out of proportion of the damages *actually* suffered, citing *Franken* v. *Carpenter,* 364 S.W.2d 15 (Mo.App. 1963). See also *Buchanan* v. *Louisiana Purchase Exposition Co.,* 149 S.W. 26, 29-30 (Mo. 1912); cf. *Christopher & Simpson Architectural Iron & Foundry Co.* v. *E. A. Steininger Const. Co.,* 205 S.W. 278, 285 (Mo.App. 1918). Defendant argues that $75,000 was grossly in excess of plaintiff's *actual* damages because plaintiff did not suffer any actual damages. His moving expenses to and from Independence were paid and he resumed his old job as soon as he returned to Oklahoma City. However, this employment was at a much lower salary.

In *Southwest Engineering,* supra, this court cited numerous cases discussing whether or not actual damages need be suffered. We observed:

> "In United States v. J. D. Streett & Co., E.D.Mo., 151 F.Supp. 469, 472, Judge Harper, in upholding a claim for liquidated damages, states:
>
> > 'Although it is clear that a finding that a provision is one for liquidated damages requires that damages could be anticipated at the time of execution of the contract, *whether actual damage did or did not occur or was not proved to have occurred does not prevent recovery.*'
>
> We affirmed upon appeal. J. D. Streett & Co. v. United States, 8 Cir., 256 F.2d 557.
>
> "The late Judge Goodrich in United States v. Le Roy Dyal Co., supra, in a well-considered opinion deal-

ing with numerous aspects of the liquidated damage issue, states:

> 'If a provision for liquidated damages is upheld *the fact that actual damage did or did not occur or was not proved to have occurred does not prevent the recovery of the stipulated sum.* There is some dissent on this point, but the statement just made represents the great weight of decided cases.' 186 F.2d 460, 462. . . .
>
> *"We believe that the cases holding that the situation existing at the time of the contract is controlling in determining the reasonableness of liquidated damages are based upon sound reasoning and represent the weight of authority.* Where parties have by their contract agreed upon a liquidated damage provision as a reasonable forecast of just compensation for breach of contract and damages are difficult to estimate accurately, such provision should be enforced. If in the course of subsequent developments, damages prove to be greater than those stipulated, the party entitled to damages is bound by the liquidated damage agreement. It is not unfair to hold the contractor performing the work to such agreement if by reason of later developments damages prove to be less or nonexistent. Each party by entering into such contractual provision took a calculated risk and is bound by reasonable contractual provisions pertaining to liquidated damages." *Id.* at 1002-1003. (Our emphasis).

We find Missouri law supports this rationale. See *Wilt* v. *Waterfield*, 273 S.W.2d 290 (Mo. 1954); *Yerxa, Andrews & Thurston, Inc.* v. *Randazzo Macaroni Mfg. Co.*, 288 S.W. 20 (Mo. 1926). In *Manufacturers Casualty Ins. Co.* v. *Sho-Me Power Corp.*, 157 F. Supp. 681 (W.D.Mo. 1957), the district court in applying Missouri law observed:

> "When the damages are uncertain in nature or amount or are difficult of ascertainment and the amount agreed on is not extravagant and unreasonably disproportionate to the damages that actually resulted from a breach of contract, the contract provision is upheld." *Id.* at 683.

But then added:

> "Of course there can be no question of the right of parties to a contract to agree among themselves what the damages should be in the event of a breach. See the old case of Morse v. Rathburn, 42 Mo. 594, with its many subsequent citations. Hence, in determining whether a provision in a contract provides for a penalty or liquidated damages the intention of the parties in each case, measured from the time the contract was executed and not from hindsight after the performance is completed, is the test to be applied." *Id.* at 684.

The early Missouri cases are discussed in *Yerxa,* supra at 33, where the court said:

> "The question is one to be determined by the contract, fairly construed, and, in arriving at a determination, the courts will seek to arrive at the intention of the parties from a consideration of the contract as a whole, the situation of the parties, the subject-matter of the contract, and all the circumstances surrounding its execution, together with the ease or difficulty of measuring the breach in damages, and the magnitude of the stipulated sum, not only as compared with the value of the subject of the contract, but in proportion to the *probable* consequence of the breach." (Our emphasis).

In *May* v. *Crawford*, 51 S.W. 693, 701 (Mo. 1899), the court commented that one of the tests was:

> "[A]nd the amount stipulated in the contract as the damages to be recovered is not 'disproportionate to the *probable* damage,' the courts will construe it to be liquidated damages." (Our emphasis).

In *Stein* v. *Bruce*, 366 S.W.2d 732, 736 (Mo.App. 1963), the Kansas City Court of Appeals observed:

> "[I]t will be our duty to hold that the stipulated sum is for liquidated damages *unless we determine it to be unreasonable in amount as a forecast of probable damages and disproportionate to the amount of damages that could probably result from the breach.*" (Emphasis in original).

Williston observes:

> "Although the mere fact that, as it turns out, the sum named exceeds the actual damage will not make it a penalty, since the reasonableness of the provision must be considered as of the date of the contract, yet the excessive size of the sum agreed upon may tend to show that the parties did not make a bona fide effort to fix the actual value of the injury." 5 Williston on Contracts § 783, at 725-726 (3d Ed. 1961).

The Restatement of Contracts § 339, Comment (c) recites:

> "Where the amount of loss or harm that has been caused by a breach is uncertain and difficult of estimation in money, experience has shown that the estimate of a court or jury is no more likely to be exact compensation than is the advance estimate of the parties themselves. Further, the enforcement of such agreements saves the time of courts, juries, parties, and witnesses and reduces the expense of litigation. In

such cases, if it is not shown that the principle of compensation has been disregarded, the liquidation by the parties is made effective."

We are, of course, required to follow Missouri law. Where uncertainty exists as to state law, consideration must be given to the rule which we believe the state court would in all probability follow under the facts presented. To measure the reasonableness of a liquidated damages stipulation by proof of the actual amount of damages incurred invokes hindsight judgment guided by events that actually occurred rather than by the intention of the parties at the time the contract was executed as to what the probable damages might be. Thus, we feel the early pronouncement of the Missouri Supreme Court that the reasonableness of damages should be measured by the probable estimate of such damage at the time of executing the contract should be the controlling principle. This is the principle adhered to by this court in *Southwest Engineering,* supra, and the proper rule we find applicable here. In light of this discussion, we find the sum of $75,000 not unreasonable. The clause is not a penalty and is enforceable.

Judgment reversed and remanded with directions to enter judgment for plaintiff in the sum of $75,000 and costs.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 73-1090.

September Term, 1973

C. Ed Gaines,
Appellant,

vs.

C. W. Jones and C. W. Jones & Jones Investment Company, d/b/a Summit Homes

and

Jomaco, Inc.,
Appellees.

JUDGMENT

(Filed October 18, 1973)

APPEAL FROM the United States District Court for the Western District of Missouri.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Missouri and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, reversed.

And it is further ordered by this Court that this cause, be and it is hereby, remanded to the said District Court with directions to enter judgment for plaintiff in the sum of $75,000 and costs in accordance with the opinion of this Court this day filed herein.

October 18, 1973

APPENDIX D

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 73-1090

C. ED GAINES,
Appellant,

vs.

C. W. JONES and C. W. JONES and JONES INVESTMENT COMPANY, d/b/a SUMMIT HOMES, and JOMACO, INC.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

PETITION FOR REHEARING

C. W. Jones, and C. W. Jones and Jones Investment Company, d/b/a Summit Homes, and Jomaco, Inc., Respondents in Case No. 73-1090, respectfully petition the Court for a rehearing with respect to its opinion filed October 18, 1973, reversing the decision of the District Court and ordering Entry of Judgment for plaintiff.

POINTS RELIED UPON

This petition is based upon the following points:

1. Although required to follow the law of the State of Missouri the Opinion of this Court decided the question of whether a stipulated sum is unenforceable as a penalty, and has further decided the question of whether plaintiff is required to prove any damage accrued as a result of the breach before he may recover, in a manner not in accord with, and directly contrary to, the applicable decisions of the Missouri Courts.

2. The Opinion failed to view the evidence in a light most favorable to the prevailing parties, in holding that the agreements did not require plaintiff to successfully obtain financing; and in holding that the $75,000 liquidated damage sum was a reasonable estimate of plaintiff's damages.

3. This Court's opinion ignored the trial court's findings of fact and conclusion of law concerning the mutual mistake of fact of the parties.

4. Judgment should not be entered against parties who prevail below when the trial court found in their favor without giving the parties opportunity to introduce their evidence on remand.

ARGUMENT

1. Although Required to Follow the Law of the State of Missouri the Opinion of This Court Decided the Question of Whether a Stipulated Sum Is Unenforceable As a Penalty, and Has Further Decided the Question of Whether Plaintiff Is Required to Prove Any Damage Accrued As a Result of the Breach Before He May Recover, in a Manner Not in Accord with, and Directly Contrary to, the Applicable Decisions of the Missouri Courts.

The Opinion of the Court correctly recognized (Slip. Op. 14) that this Court *must* follow the law of the State of Missouri. Yet, the Opinion fails to do so in two important respects. The first is the issue of whether an amount which bears no relationship to the damages actually suffered may be recovered as liquidated damages, or whether such amount is an unenforceable penalty; the second is whether the party seeking to recover must prove that damages *in fact* accrued as a result of the breach.

In Missouri, it is incumbent upon the party seeking *recovery* to prove that damages have in fact accrued, and the stipulated amount is not out of proportion to the damages actually suffered. *Franken* v. *Carpenter*, 364 S.W. 2d 15, 19 (St.L. C.A., 1963). The stipulation in the contract does not furnish the measure of damages, when in fact none were entailed by the breach. *Corrigan Co. Mechanical Contractors* v. *Fleischer*, 423 S.W. 2d 209, 214 (St.L. C.A., 1967). In Missouri the party seeking recovery must prove that damages accrued *in fact*; mere nominal damage is insufficient to sustain recovery of a stipulated amount. *Corrigan*, supra, l.c. 214.

The Missouri cases cited by this Court in its Opinion support this view. *Wilt* v. *Waterfield*, 273 S.W. 2d 290 (Sup. Ct., Mo., 1954) l.c. 296 clearly rules that a liquidated damage provision of $1,900 is a penalty, and unenforceable. *Manufacturers Casualty Ins. Co.* v. *Sho-Me Power Corp.*, 157 F. Supp. 681 (W.D., Mo., 1957), (applying Missouri law) held that if the amount were disproportionate to the damages *actually* suffered, the provision must fail under Missouri law.

Finally, the only other Missouri case cited which has been decided within the last 74 years, *Stein* v. *Bruce*, 366 S.W. 2d 732 (Mo. App., 1963) supports the view that actual damage must accrue, l.c. 736.

The cases of *Southwest Engineering Co.* v. *U. S.*, 341 F. 2d 998 (8th Cir., 1965) and *U. S.* v. *J. D. Streett and Co.*, 151 F. Supp. 469 (E.D., Mo., 1957) are clearly inapplicable, for there *Federal* law was being applied. They do *not* represent the law of Missouri, and the opinion in this case clearly applies inapplicable law in relying upon them.

Finally, the Court's Opinion refers to and relies upon Restatement of Contracts, Sec. 339, Comment (c). However, the Opinion overlooks that portion of Comment (e) which provides an exception to the exception, i.e., ". . . when no harm *at all*" has accrued, the advance agreement as to damages to be paid is unenforceable. This Rule has been followed in Missouri, *Corrigan*, supra, l.c. 423 S.W. 2d 214.

Indeed, the Opinion in this case (Slip. Op. 14) implicitly recognizes that it is *not* following the applicable law of Missouri, when it is stated that the Court is applying the test which it believes "*should be* the controlling principle" (emphasis added).

Missouri law is crystal clear that an amount which bears *no* relationship to the actual damages suffered is a penalty and not enforceable in a Missouri Court, and that the party seeking recovery must prove that he actually suffered damages as a result of the breach. The instant opinion substitutes this Court's belief as to: (a) what the law should be; and (b) what the law is in other jurisdictions. However, that is clearly improper; the issue is what Missouri courts would rule.

At page 14 of the Court's Opinion, it is indicated that an uncertain area of Missouri State Law exists as to the method of determining the "reasonableness" of a liquidated damage agreement. The law is clear in Missouri that the test of "reasonableness" of a stipulated agreement is proof *by plaintiff* of actual, substantial damages as a result of the breach which are reasonably related to the stipulated amount. *Corrigan,* supra, l.c. 423 S.W. 2d 214; *Franken,* supra, l.c. 364 S.W. 2d 19.

Assuming *arguendo,* that the law in Missouri is unclear, the Opinion failed to give great weight to the District Court's interpretation of Missouri law, as it is required to do, *Luke* v. *American Family Mutual Insurance Co.,* 476 F. 2d 1015 (8th Cir., 1973). The Opinion applies what it "believes" to be the rule, i.e., "the early pronouncement of the Missouri Supreme Court". The learned Trial Judge reached a contrary conclusion. His decision should have been given great weight. Instead, the Opinion applies what it ". . . feel(s) . . . should be the controlling principle" (p. 14, Slip. Op.) This is clearly an improper test. An interpretation applying what this Court "feels should be the controlling principle" and ignoring the District Court interpretation of state law is error. This is particularly true where the cases relied upon by the District Court have been decided within the last ten years and the cases which are

thought to create an "uncertainty" of the law are between 50 and 80 years old ("early pronouncements").

2. The Opinion Failed to View the Evidence in a Light Most Favorable to the Prevailing Parties, in Holding That the Agreements Did Not Require Plaintiff to Successfully Obtain Financing; and in Holding That the $75,000 Liquidated Damage Sum Was a Reasonable Estimate of Plaintiff's Damages.

This Court ignored the evidence favorable to the prevailing parties but instead improperly construed the facts in favor of plaintiff. This method of interpretation constitutes error. *Farmers' Co-op Elevator Association* v. *Strand*, 382 F. 2d 224 (8th Cir., 1967), cert. denied 389 U.S. 1014.

The Opinion (Slip. Op. 10) rules that plaintiff could have expected to earn between $50,000 and $60,000 per year under the Employment Contract and therefore the liquidated damage amount was "reasonable", although no evidence supports this holding.

The Opinion of this Court ignores the fact that three contracts were signed contemporaneously, and that the Trial Court construed all three documents together. Under the Employment Contract plaintiff was to earn only $3,000 a month and he was actually paid $21,000 on that contract for seven months' work. Only under the Partnership Agreement was the plaintiff entitled to compensation based upon a percentage of profits. This Court referred only to the Employment Contract when it ruled (p. 6, Slip. Op.) that the "contract did not require success in obtaining financing". Yet, at p. 10 of the Opinion his Court clearly *does* recognize that the two contracts must be read together when it states that plaintiff could have expected to earn "$60,000 a year in profits". The only

document providing for profit sharing is the Partnership Agreement. It can not be both ways. Either the Employment Contract must be construed with the other agreements, as the Trial Court did, or the Employment Contract must stand alone.

It was clearly understood that under the Partnership Agreement Purposes (Article I, para. 1.6) *successful* negotation of mortgage financing was required in order to share in the profits. Plaintiff admitted this (Tr. 81, 201-202). Without financing it was clear *no* profits could be made, and indeed the Court found none were made. Under the Employment Contract, plaintiff earned $21,000 in seven months. He suffered no out-of-pocket damages. Clearly, under the Employment Contract, the difference between what plaintiff could have reasonably expected to earn and $75,000 is so clearly "unreasonably disproportionate" as to be a penalty. The District Judge so found (Findings 36, 37, 38, 39, 40, 41; Conclusion 7). This Court failed to find the Judge's finding in this regard "clearly erroneous" as it is required to do before it may upset a Trial Judge's finding of facts. *U. S.* v. *U. S. Gypsum*, 333 U.S. 364 (1948). This Court's Opinion ruled that for purposes of determining the "reasonableness" of the $75,000 sum the Partnership Agreement merged with the Employment Contract, while for purposes of plaintiff's job requirements the two did not merge. This Court's ruling was clearly error and unsupported by any evidence.

3. This Court's Opinion Ignored the Trial Court's Findings of Fact and Conclusion of Law Concerning the Mutual Mistake of Fact of the Parties.

The trial court found as a fact that plaintiff knew of the fraudulent misrepresentations made to Jones by Felix (Finding No. 7). This was well established by plain-

tiff's own testimony (App. 130-131). There were repeated references in the contractual documents to plaintiff as general manager. The trial court's finding as to inferences to be drawn from the documents and other evidence (Findings 16, 30 and 33, Conclusion 8) were overlooked by this Court in its opinion (Slip Op. 8).

Plaintiff understood that he was being hired, "because of the special and established executive ability which plaintiff claimed to have. . ." (Finding 12). Plaintiff knew Jones was relying upon these representations as to plaintiff's ability (Finding 13). The trial court's holding that "Jones expected Gaines to carry out all but the highest executive responsibilities" was established by plaintiff's own testimony (App. 129-130).

This Court ignored the trial court's findings of fact, conclusions of law and the supporting record as to the mutual mistake of fact. Basically such mutual mistake prevented any contract from existing.

4. Judgment Should Not Be Entered Against Parties Who Prevail Below When the Trial Court Found in Their Favor Without Giving the Parties Opportunity to Introduce Their Evidence on Remand.

Defendants were convinced at trial that plaintiff had not sustained his burden of proof in various respects. The trial court agreed and entered judgment in favor of defendants. This illustrates that defendants' conclusion that no evidence should be introduced because plaintiff had failed to prove his case was not unreasonable. It is manifestly unjust to enter judgment on appeal without giving these defendants opportunity to introduce their evidence upon remand if the decision below in favor of defendants is not affirmed.

CONCLUSION

For all of the reasons stated above, this petition for rehearing should be granted and considered by the Court.

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APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 73-1090

September Term, 1973

C. Ed Gaines,
Appellant,

vs.

C. W. Jones and C. W. Jones &
Jones Investment Company,
d/b/a Summit Homes

and

Jomaco, Inc.,
Appellees.

Appeal from the United States District Court
for the Western District of Missouri.

Appellees' petition for rehearing has been carefully considered by the court and it is hereby denied.

Prior to the issuance of this court's mandate in this cause counsel for the parties to this appeal are requested to submit, within five days of this order, simultaneous cross-memorandums on the question of interest. Memorandums are to be typewritten on letter-size paper, fastened in the left margin and are not to exceed seven pages in length. An original and four copies should be filed with the clerk of this court and additional copies served on opposing counsel.

November 8, 1973

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 73-1090

September Term, 1973

C. Ed Gaines,
Appellant,

vs.

C. W. Jones and C. W. Jones & Jones
Investment Company, d/b/a
Summit Homes

and

Jomaco, Inc.,
Appellees.

Appeal from the United States District Court
for the Western District of Missouri.

On consideration of various matters pending before the court in this appeal from the United States District Court for the Western District of Missouri it is now here ordered:

1) This court's judgment is to reflect that interest is to be entered on the judgment of the aforesaid district court at the rate of six percent per annum from May 15, 1970, the date on which the plaintiffs' services were terminated.

2) The issuance of our mandate herein is hereby stayed for a period of thirty days from and after this date conditioned on the filing of a good and sufficient bond with the clerk of the United States District Court for the

Western District of Missouri, who is to approve the bond as to form. The said bond is to be filed with the said clerk within seven days from the date of this order. If within said period of thirty days there is filed with the clerk of this court a certificate of the clerk of the Supreme Court of the United States that a petition for writ of certiorari has been filed the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

November 23, 1973